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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 454.

MUTUAL LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

TINE COHEN, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

S. WARBURTON,
Attorney for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-14-1900

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 454.

MUTUAL LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

TINE COHEN, DEFENDANT IN ERROR.

STATEMENT.

The questions in this brief are all considered in either the Sears or Hill brief. In this case there is no question of estoppel. None is even attempted to be plead; nor is there any claim made that Mrs. Cohen is in any manner estopped from asserting her rights under the policy.

On the 10th day of June, 1885, Mr. Cohen took out this policy of insurance. He paid 7½ annual premiums, paying the last one June 10, 1892. Defendant in error commenced her action in the circuit court on the policy. Defendant in error defended on the ground that the policy was forfeited on December 10, 1892, for non-payment of premium. The plaintiff in error demurred to this answer, claiming that the act of 1877 was a part of her contract, and the plaintiff in error had failed to show it had forfeited the

policy according to that law. The plaintiff in error claimed that the defendant in error could not assert any right under the act of 1877 for the following reasons only: That the policy was a Montana contract; that the statute of 1877 had been waived by an express provision of the policy; that under the said statute it was not necessary to send notices to non-residents. This is the sum total of its defense in the circuit court.

It made no other claim. It never referred in any manner to the act of 1897. It never made any claim that the statute of 1877 had been repealed or modified; but its whole contention was upon the theory that the contract never came under the protection of the act of 1877. It subsequently appealed the case to the circuit court of appeals. It made the same contention there and none other. It did not mention the act of 1897, much less base any claim upon it, or claim any rights under it. We venture the assertion that both the lower court and the circuit court of appeals were entirely ignorant of the fact that there was such a law as that of 1897 in existence. Counsel for defendant in error surely was. Defendant in error, we take it, will not claim it was. What excuse it may have or urge for not making the point we cannot imagine. That the plaintiff in error never raised this point is apparent from the decision of the circuit court of appeals. The principal opinion was written in the case of Hill *vs.* Ins. Co., 97 Fed., 263, and it shows conclusively no such question was raised. We will file a certified copy of the brief of plaintiff in error filed by it in that court, which fully supports our claim.

Points of Difference between this Case and the Sears and Hill Cases.

1. THERE IS NO CLAIM THAT MRS. COHEN IS ESTOPPED FROM ASSERTING HER CLAIM UNDER THIS POLICY.

2. THE ONLY DEFENSE IS THAT THIS POLICY BECAME FORFEITED BY ITS TERMS.

3. MRS. COHEN IS THE BENEFICIARY, AND DECLARATIONS OR AGREEMENTS MADE BY MR. COHEN COULD NOT BIND HER AS CLAIMED.

ARGUMENT.

I.

NEW YORK WAS THE PLACE OF CONTRACT, AND THE STATUTE OF 1877 WAS A PART OF THE CONTRACT.

In this case, as in the Sears, the contract was to be wholly performed in New York. The stipulation in the application contained the following agreement: That the application was made "subject to the charter of the company and the laws of New York" (Record, p. 22).

Our brief in the Sears case (pages 4–13, inclusive) fully covers the argument on this point, if any be needed, in view of the admission made by plaintiff in error on pages 72 to —, inclusive, in its Cohen brief, as follows:

"Cohen defaulted June, 1893, 1894, 1895, 1896. No notice having been sent the policy was not forfeited. This was the condition of things on June 10, 1896, and would have continued unless the legislature had intervened. During 1896 Cohen could at any time have paid up his premiums with interest, and restored his policy. *He had no*

other rights. By the terms of his contract it was forfeited, but the statute as to notice held this forfeiture as it were in suspense. It did not relieve him from the obligation to pay his premiums. It simply prevented the contracted effect of non-payment from taking place. There was no vested right in this effect. Cohen could say I paid no premium, but you have sent no notice, therefore my contract cannot be forfeited for that non-payment. We must admit that but for the act of 1897 the Cohen policy could not be forfeited for non-payment of the premium of June, 1896, until the statute of limitations had run, and it is not now important to determine whether that statute was the legal or equitable statute."

Plaintiff in error's brief, Cohen case, p. 72.

II.

THE STATUTE OF 1877 WAS A LIMITATION ON THE POWER OF THE CORPORATION TO FORFEIT CONTRACTS OF INSURANCE, EXCEPT IN CONFORMITY TO THE METHOD PROVIDED BY THE ACT.

This point is fully covered on pages 13–30, inclusive, Sears' brief.

III.

THE STATUTE COULD NOT BE WAIVED BY AN EXPRESS PROVISION OF THE POLICY TO THAT EFFECT.

This point is also fully covered in the Sears brief, pages 31–40, inclusive.

IV.

IT WAS NOT NECESSARY TO ALLEGE OR PROVE THE PAYMENT OF THE PREMIUMS. IT WAS NOT NECESSARY TO ALLEGE OR PROVE THE STATUTE OF NEW YORK; NEITHER WAS THERE A DEPARTURE FROM LAW TO LAW.

This point is fully covered by the argument in the Sears brief, pages 111–121, inclusive.

V.

THE PLAINTIFF IN ERROR DID NOT AND DOES NOT CLAIM TO HAVE PLEAD AN ESTOPPEL IN THIS CASE. THIS DEFENSE, WHICH IT CLAIMS TO HAVE MADE IN BOTH THE SEARS AND HILL CASES, IS ENTIRELY WANTING. SUCH A DEFENSE, IF ATTEMPTED TO HAVE BEEN MADE, WOULD NOT BE GOOD AGAINST MRS. COHEN, THE BENEFICIARY.

VI.

THE QUESTION OF THE APPLICABILITY OR EFFECT OF THE STATUTE OF 1897 SHOULD NOT BE CONSIDERED BY THIS COURT.

This case was submitted to the circuit court on the applicability of the statute of New York of 1877 only. The defendant in error claimed at the trial in the circuit court that the statute of New York of 1877 applied to the contract and governed the liability of the parties. The plaintiff in error contested this claim on the following grounds only:

That the statute of 1877 had no application for the reason that the contract was a Washington contract, and forfeited for non-payment of premiums; that the statute of New York of 1877 did not require the notices mentioned in the act to be served on non-resident policy-holders; that the notice required by the act of 1877 was by an express provision of the policy waived; that no tender of premiums had been made prior to commencement of action; that the cause of action was not properly pleaded, and that there was a departure.

These questions and these only were presented to the circuit court of appeals as grounds for reversal. The opinion of the circuit court of appeals, found in the record, fully

sustains this claim. The answer of plaintiff in error (see record) is based on the above points and those only. We will file with this brief a certified copy of the brief of plaintiff in error which it filed in the circuit court of appeals, which shows conclusively that the above points were the only ones raised and presented to the circuit court of appeals. The plaintiff in error submitted its case to the circuit court of appeals for reversal on those points and upon none others. It was never suggested by it at any time prior to the filing of its writ of certiorari here that there was in existence any such statute as that of 1897, much less was any claim made or based upon the statute of 1897. Having submitted its case thus made to a court whose decision is final, except in case of great gravity, etc., it is too late for plaintiff in error to raise the point in this court. It is a rule of practice, which we think is universal, that a party cannot raise a question in an appellate court that he did not raise and bring to the attention of the trial court, except it be one of jurisdiction. In such cases the party has as a matter of right an appeal to the appellate court. With how much greater force should the rule apply in a case where he has no such privilege of appeal as a matter of right, but where the right of appeal lies solely in the discretion of the higher court?

For full discussion of this point see Sears' brief, pages 124-130.

VII.

THE ACTION IS NOT BARRED BY THE LIMITATION CREATED BY ACT OF 1897.

The bar was not pleaded. (See Sears' brief, pages 130–136, inclusive.)

VIII.

THE ENACTMENT OF THE ACT OF 1897 DID NOT DISPENSE WITH THE STATUTORY NOTICE THERETOFORE PRESCRIBED.

This point is fully discussed in Sears' brief, pages 136–142, inclusive.

IX.

THE ACT OF 1897, IF SO INTENDED, WOULD CONSTITUTE AN IMPAIRMENT OF THE CONTRACT AND DISTURB VESTED RIGHTS.

This point is also fully covered in the Sears brief, pages 130–141, inclusive, to which brief we ask the court's attention. We will only add the following:

The policy was written on Mr. Hill's life for the benefit of his wife, who is and ever after the issuance of the policy was the real party in interest. The policy is termed a semi-endowment policy. On this policy Mrs. Cohen paid 7½ annual premiums. These premiums were very large, on account of the endowment feature of the contract, and as a consequence the reserve thereon was proportionately large. It is claimed that the policy became forfeited on the 10th day of December, 1892. At that time he was entitled under the act of 1879, chapter 347, Laws of 1879, to a paid-up policy of over $1,000, or extended insurance of over 13 years or about 9 years beyond his death (See Flitcraft's Manual on Insurance, '95 ed.), the company still forfeiting, as it might do under said act of 1879, one-third of said reserve; but under the said law of 1879 it was necessary for the beneficiary to surrender the policy within six months after forfeiture to get the benefit of either her extended or paid-up insurance; but it was not necessary for her to make her election until after she was placed in default. This was

expressly held by the highest court of New York in the case of Stokes *vs.* Ammerman, 121 N. Y., 337, on p. 323:

"It is not quite true that a failure of the wife to pay the premiums from year to year as they become due will work this result. The statute, unless waived in writing (it should have same in writing, in red ink, on the face of the policy; see chapter 347, Laws of New York, 1879) on the face of the policy, provides that after the lapse of three years the reserve value of the policy, computed according to certain principles, is to be taken as a single premium of life insurance, at the published rates of the company, at the time the policy was issued, and must be applied either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance of that amount at the age of the insured at the time of lapse, or to the purchase upon the same life, at the same age, paid-up insurance payable at the same time, and under the same conditions, except as to payment of premiums, as the original policy (chapter 347, Laws 1879). *And no policy can be declared or treated as lapsed or forfeited until 30 days after notice to the policy-holder.*"

Mrs. Cohen did not need to make her election under the laws of 1877 and 1879, which were in force when her contract was made, until she was served with the statutory notice, which, it is admitted, never was served when the case was tried in the circuit court. The plaintiff in error claimed the benefit of the act of 1877. Without its saving provision, the act of 1879 was of no benefit, because if default had occurred in December, 1892, more than six months had elapsed after such default, and there had been no surrender of the old policy for the new one, either for extended or paid-up insurance. The right to this notice, before being compelled to exercise her election in such a case, is surely a valuable vested right, especially when the penalty involved is taken into consideration. The act of 1897 does not pretend to take away any such valuable right, or produce any such harmful results. It is certainly within reason and a presumption in law that it was an inducement to Mrs. Cohen to

make this contract with this company and bring it under the New York laws, so he could have the benefit of their protection. We have discussed this feature of the case fully in the Sears brief, to which we ask the court's attention for further consideration.

See Sears' brief, pp. 136–141.

POINT X.

A point is made by plaintiff in error on the statute of 1897, to which there are two answers. One of them is omitted inadvertently from the Sears brief. It is here submitted for both the Cohen and Sears cases.

The argument is (1) that the statute of 1897 applies; (2) the policy became forfeit on the due date in 1897, whenever the due date was later than April 8 (date of act of 1897), because of non-payment of the 1896 premium. In other words (take the Sears policy), the policy became forfeit May 18, 1897, because the May, 1896, premium was not paid within the year following the due day thereof.

The answers are (1) (made in Sears' brief) the act of 1897 does not apply to non-resident policy-holders; (2) on April 8, 1897, Sears had a subsisting policy, subject to forfeiture for non-payment of past premiums if the company should give him 30 days' notice and he not pay within the 30 days. If the company had on April 8, 1897, given the notice, the policy would have been valid until May 8. The company asks the court to impute to the legislature the intent to forfeit it 10 days later *without notice*, though, in order to do so, the court must give a retroactive effect to a statute the language of which does not require it.

XI.

THE STATUTORY PROVISIONS REQUIRING NOTICE WHICH WERE IN EFFECT AT THE TIME OF THE ENACTMENT OF THE ACT OF 1897 WERE NOT REPEALED THEREBY AS TO EXISTING POLICIES.

Sears' brief, p. 142

a.

THE ACT OF 1892 DID NOT REPEAL THE ACT OF 1877 AS TO EXISTING POLICIES.

Sears' brief, pp. 141, 142.

b.

THE ACT OF 1897 DID NOT REPEAL THE ACT OF 1877 NOR SECTION 291 OF THE ACT OF 1892.

Sears' brief, pp. 143–145.

d.

THE ACT OF 1897 DID NOT REPEAL SECTION 92 OF THE ACT OF 1892 AS TO EXISTING POLICIES.

Sears' brief, pp. 145–150.

e.

IN ORDER THAT AN ACT BE UPHELD AS A VALIDATING ACT, IT IS ESSENTIAL THAT THE INTENT BE CLEARLY EXPRESSED.

Sears' brief, pp. 150, 151.

We respectfully submit that the judgment of the circuit court of appeals, as well as the judgment of the circuit court, should in all things be affirmed.

S. WARBURTON,
Attorney for Plaintiff in Error.